



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Adak Communications Systems, Inc.--Reconsideration

File: B-228450.3; B-228450.4

Date: April 18, 1988

DIGEST

1. General Accounting Office (GAO) affirms its dismissal of a protest where the protester failed to submit a response to GAO concerning the contracting agency's bid protest report within 10 working days after the scheduled receipt date of the report as required by GAO's Bid Protest Regulations. See 4 C.F.R. § 21.3(k) (1988).

2. General Accounting Office (GAO) will not consider a new protest of solicitation improprieties, even though received prior to the closing date for submission of proposals, where an identical protest had been earlier dismissed because the protester failed to timely communicate with GAO concerning the contracting agency's bid protest report.

DECISION

By letter of March 22, 1988, Adak Communications Systems, Inc., requested that we reopen the file and consider on the merits its January 21, 1988, protest under Air Force request for proposals No. F16602-87-R-0019, issued by Barksdale Air Force Base, Louisiana. The protester had objected to the fact that the solicitation gave greater weight to technical considerations than it did to cost and alleged that some of the technical evaluation criteria were duplicative and unclear. By letter of April 4, Adak has also attempted to refile its January protest under the new date for receipt of proposals established after we dismissed its initial protest. We affirm our prior dismissal of the protest, and we dismiss the April 4 protest.

Reconsideration Request

We received the Air Force's report responding to the January protest on the scheduled due date, February 29, 1988, but received no communication from Adak regarding the Air Force

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report within the 10-day period provided by our Bid Protest Regulations, 4 C.F.R. § 21.3(k) (1988). Consequently, on March 16, 1988, we dismissed the protest because the protester had not timely pursued it.

By letter dated and received March 21, Adak submitted comments on the Air Force report and by letter dated March 22, received on March 23, Adak requested the reopening of the file. Adak's March 22 letter argues that since it had not received the Air Force report until March 7, 1988, past the scheduled due date for receipt thereof, our dismissal was premature and must be vacated. Specifically, Adak argues that it did submit its comments to us within ten (10) days from Adak's receipt of the Air Force report and that the "Air Force was much more culpable than was the protester under the circumstances." Further, Adak argues "unless the Air Force or the GAO can show that it was prejudiced . . . the drastic result of dismissal should not obtain" inasmuch as section 21.1(f) of GAO's Bid Protest Regulations does not require, but rather permits, dismissal in these circumstances. Finally, Adak argues that section 21.3(k) of GAO's Bid Protest Regulations is ambiguous by not indicating that the "protester must advise the GAO of its non-receipt [of the contracting agency's report] within ten (10) days [of the scheduled date]" for the report's receipt or "that dismissal will result if such notification is not forthcoming." Instead, Adak argues that a "reasonable reading" of section 21.3(k) would allow a protester a reasonable time to notify GAO that it had not received the report and it maintains that its March 21 comments clearly constituted reasonably prompt notice of its nonreceipt of the Air Force report by the scheduled date of February 29.

The predecessor of section 21.3(k), above, provided a 7-day period for comments on the contracting agency's report. See 4 C.F.R. § 21.3(e) (1987). In interpreting this provision of our Regulations, we stated that we assumed that protesters received a copy of the report on the date we received it, and we viewed the 7-day period for filing comments to run from that date. See Dresser Industries, Inc.; Analytics Communications Systems, Inc., B-218535.3; B-220615.3, Jan. 6, 1986, 86-1 CPD ¶ 10. The rationale for that construction of the regulation is that we have no means of determining the precise date that a protester receives the agency report. Harrell-Patterson Contracting, Inc.--Request for Reconsideration, 65 Comp. Gen. 330 (1986), 86-1 CPD ¶ 180. Moreover, since the Competition in Contracting Act of 1984 (CICA) generally requires our Office to issue a decision within 90 days after the protest is filed, 31 U.S.C. § 3554 (Supp. III 1985), we need to establish a date of receipt of the agency report by the protester upon which we may rely in the absence of information to the

contrary. This interpretation is equally applicable to the new section 21.3(k), which now also specifically informs protesters that we "assume the protester received the agency report no later than the scheduled due date as specified in the acknowledgment of protest furnished by the General Accounting Office, unless otherwise advised by the protester."

In conformity with 21.3(k), our acknowledgment letter to Adak informed Adak of the expected date (February 29, 1988), for receipt of the agency report and requested Adak to notify us "at that time" if it had not received the Air Force report "since, unless we hear from you within ten working days of our receipt of the report, we will close our file without action." Consequently, Adak was obligated under the clear wording of our acknowledgment letter and of § 21.3(k) to give us prompt notice if it did not receive the Air Force report by February 29. We therefore reject Adak's argument that our Regulations are ambiguous in this regard. Adak did not inform us of its nonreceipt of the Air Force report on February 29 until March 21 (5 days after our dismissal of Adak's protest) when we received its March 21 letter of comments. Under these circumstances, it is clear that Adak did not give us the required prompt notice of its nonreceipt of the Air Force report contrary to its argument that it did.

We also reject the protester's argument that the dismissal of its protest is unfair or that a showing of actual prejudice is required to uphold the dismissal. If this dismissal procedure were not used, the protester could await the report for an indefinite time to the detriment of the contracting process, as well as to our ability to resolve protests expeditiously. Protesters who do not promptly inform us of their nonreceipt of the contracting agency's report by the scheduled date will have their protests dismissed pursuant to our Bid Protest Regulations.

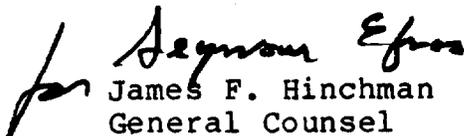
We affirm our dismissal of the protest.

April 4 Protest

In response to Adak's January protest, the Air Force ultimately extended the closing date for receipt of proposals under the RFP to April 5. Adak therefore argues that its April 4 protest, although admittedly identical to its January 21 protest should be considered timely filed and we therefore should issue a decision on the merits.

We have considered and rejected another protester's attempt to refile a dismissed protest in identical circumstances. Pacific Lighting Energy Systems, 65 Comp. Gen. 13 (1985), 85-2 CPD ¶ 381. Specifically, in the cited case, we noted that our Bid Protest Regulations do not contemplate the prebid opening (or preclosing date) resubmission and reconsideration of a protest identical to one already dismissed by our Office for the protester's failure to timely communicate with our Office concerning the contracting agency's protest report. Accepting such a refiling would, for example, permit a protester that neglected its obligation to comment or express interest in the protest to forestall a contract award or otherwise delay a procurement simply by resubmitting its comments on the eve of bid opening as a protest. This result clearly would be inconsistent with fair, orderly and expeditious contracting and would impair timely resolution of protests. A protester who fails to comment on the agency report or express interest in the protest in a timely fashion, in effect, has abandoned its protest for our purposes, and will not be permitted to resubmit previously untimely comments as a new protest or otherwise revive the complaint.

Under these circumstances, we will not consider the merits of Adak's April 4 protest, and it is dismissed.


James F. Hinchman
General Counsel